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No. 80-6610

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

ORIGINAL COPY

MARVIN EDWIN JOHNSON,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

_____/

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 393 So.2d 1069 (Fla. 1981).

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, § 1257(3), or any other provision thereof, at least for the purpose of determining whether to decline assumption thereof.

QUESTIONS PRESENTED

The questions presented below are different facets on the question presented on page vii of the petition and are restated from the issues set forth under the subheading REASONS FOR GRANTING THE WRIT beginning on page 5 of the petition.

I

THE IMPOSITION OF THE DEATH PENALTY FOLLOWING AN ADVISORY RECOMMENDATION OF LIFE BY THE JURY DOES NOT VIOLATE ANY PROVISION OF THE UNITED STATES CONSTITUTION.

A. The Imposition of Death After a Jury Recommendation of Life Imprisonment, Although Contrary to the Procedure Followed in Other States, Does not Deprive Petitioner of any Rights Under the Sixth, Eighth or Fourteenth Amendments.

B. Florida's Practice, as Interpreted by The Supreme Court of Florida, Does not Violate the Federal Constitution.

C. Florida's Practice Authorized by its Death Penalty Statute, of Permitting a Trial Judge to Override a Jury Advisory Recommendation of Life Imprisonment Does not Violate the Federal Constitution.

D. Florida's Practice of Permitting a Trial Judge to Override a Jury Advisory Recommendation Does not Present any Double Jeopardy Problem Under the Fifth and Fourteenth Amendments.

E. Florida's Practice of Permitting a Trial Judge to Override a Jury Advisory Recommendation is Constitutional and Fair to all Parties Concerned.

F. The Imposition of the Death Penalty by a Trial Judge by Overriding the Advisory Recommendation of the Jury Neither Conflicts With any Plan of Limited and Representative Government nor Violates the Principle of Judicial Restraint.

STATEMENT OF THE CASE

Respondent has no quarrel with petitioner's statement of the case and accepts same as set forth in his Petition on pp. 4, 5 thereof.

ARGUMENT

I

THE IMPOSITION OF THE DEATH PENALTY FOLLOWING AN ADVISORY RECOMMENDATION OF LIFE BY THE JURY DOES NOT VIOLATE ANY PROVISION OF THE UNITED STATES CONSTITUTION.

Petitioner asks this Court to exercise its jurisdiction to review a feature of the Florida

capital-sentencing scheme which twice received the blessing and praise of this Court. In Proffitt v. Florida, 428 U.S. 242 (1976), this Court conducted a thorough review of § 921.141, Florida Statutes, to determine whether it was constitutional in light of Furman v. Georgia, 408 U.S. 238 (1972). It is evident from the following statements of this Court that the decision of the Florida Legislature to empower judges rather than juries to impose the sentence in capital cases was entirely constitutional, as was the decision to provide that the jury's recommendation of sentence was to be advisory only:

> The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 US 510, 519 n 15, 20 L Ed 2d 776, 88 S Ct 1770, 46 Ohio Ops 2d 368 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.
>
> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted."

428 U.S., at 252, 253. It cannot seriously be contended that these conclusions are to be ignored or cast in doubt

merely because the jury in Proffitt had recommended the sentence of death.

The following year this Court rendered its decision in Dobbert v. Florida, 432 U.S. 282 (1977), a capital case in which the judge had sentenced the defendant to death over the recommendation of the jury. While it is true that Dobbert's principal attack was upon the ex post facto application of the new statute to him, this Court again gave specific approval to the aspect of the statute challenged by petitioner:

> Hence, petitioner's speculation that the jury would have recommended life were the prior procedure in effect is not compelling. We must compare the two statutory procedures in toto to determine if the new may be fairly characterized as more onerous. Under the old procedure, the death penalty was "presumed" unless the jury, in its unbridled discretion, made a recommendation for mercy. The Florida Legislature enacted the new procedure specifically to provide the constitutional procedural protections required by Furman, thus providing capital defendants with more, rather than less, judicial protection. These protections, upheld by this Court in Proffitt, provided are substantial. A separate hearing is held; the defendant is allowed to present any relevant mitigating evidence. The jury renders an advisory verdict based upon its perception of aggravating and mitigating factors in the case. The court makes the final determination, but may impose death only after making a written finding that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> Finally, in what may be termed a tripartite review, the Florida Supreme Court is required to review each sentence of death. This required review, not present under the old procedure, is by no means perfunctory; as was noted in Proffitt, as of that time the Florida Supreme Court had vacated 8 of the 21 death sentences that it had reviewed to that date. 428 US, at 253, 49 L Ed 2d 913, 96 S Ct 2960. Perhaps most importantly, the Florida Supreme Court has held that the following standard must be used to review a trial court's rejection of a jury's recommendation of life:

> "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So 2d 908, 910 (1975)(emphasis added)(cited with approbation in Proffitt v. Florida, 428 US, at 249, 49 L Ed 2d 913, 96 S Ct 2960).
>
> This crucial protection demonstrates that the new statute affords significantly more safeguards to the defendant than did the old. Death is not automatic, absent a jury recommendation of mercy, as it was under the old procedure. A jury recommendation of life may be overridden by the trial judge only under the exacting standards of Tedder. Hence, defendants are not significantly disadvantaged vis-a-vis the recommendation of life by the jury; on the otherhand, unlike the old statute, a jury determination of death is not binding. Under the new statute, defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court. No such protection was afforded by the old staute.

432 U.S., at 294-296.

As will be more fully discussed below, petitioner's attack upon the constitutionality of the Florida statute is based upon a single faulty premise; that an advisory recommendation of sentence by a jury is equivalent to a jury verdict of acquittal or guilt. It is from this faulty premise that petitioner contends that Florida's death penalty statute violates centuries of jurisprudential tradition, relying as he must, upon judicial opinions and legal commentary which uphold the right to a trial by jury and which, quite clearly, are not relevant to any issue raised in this proceeding.

Since petitioner has thus failed to present to this Court any issue which it has not already decided to his detriment or any compelling reason why it should re-review its recent holdings, this Court should refuse to grant the

writ.

A. The Imposition of Death After a Jury Recommendation of Life Imprisonment, Although Contrary to the Procedure Followed in Other States, Does not Deprive Petitioner of any Rights Under the Sixth, Eighth or Fourteenth Amendments.

While petitioner has provided this Court with the benefit of his research into the capital punishment statutes of the various states, he has utterly failed to demonstrate why the results thereof should compel this Court to reverse its decision in Proffitt and find the Florida capital punishment statute constitutionally defective insofar as it authorizes the sentencing court to impose the sentence of death notwithstanding the recommendation of life imprisonment by the jury.[1]

Petitioner would have this Court find a constitutional defect from the fact that the majority of states do not permit the sentencing court to override the recommendation of the jury. Respondent finds nothing in the United States Constitution which requires uniformity in this regard and would suggest that it would be abhorrent to concepts of federalism and judicial restraint for this Court to find error of constitutional dimension in the decision of the Florida Legislature to enact a capital-sentencing scheme different from that of a majority of states.[2] Certainly

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[1] While petitioner is only concerned with the aspect of the Florida capital-sentencing scheme which empowers the sentencing judge to override the recommendation of the jury in favor of life imprisonment, the Florida scheme also seeks to assure that the death sentence is imposed on the basis of reason rather than emotion or caprice by allowing the judge to ignore a jury's recommendation of death. Proffitt, 428 U.S., at 252; State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

[2] As petitioner admits, the State of Indiana has likewise enacted a statute, in response to Furman, which permits the sentencing judge to override the advisory recommendation of the jury, regardless of whether that recommendation is in favor of life or death. In fact the Indiana Supreme Court recently upheld this aspect of the Indiana death penalty statute [Ind. Code § 35-50-2-9 (Burns 1979 Repl.)] in Judy v. State, 416 N.Ed.2d 95, 108 (Ind. 1981).

this Court has not heretofore required such uniformity in response to Furman v. Georgia, supra.[3] In fact, this Court has not required any jury involvement whatsoever in capital sentencing. Lockett v. Ohio, 438 U.S. 586, 609 n. 15 (1978). Furthermore it is to be remembered that "the States have always enjoyed 'wide leeway in dividing responsibility between judge and jury in criminal cases.'" Chaffin v. Stynchombe, 412 U.S. 17, 22 (1973), quoting from Spencer v. Texas, 385 U.S. 554 (1967).

Petitioner next suggests as an "additional indicator of unconstitutionality" the rarity with which death sentences were imposed and executed following jury recommendations of life in the states of Utah and New York prior to Furman. (Petitioner's brief at P. 10) Frankly, we cannot see how this indicator suggests a constitutional problem with the Florida statute. The records of the Florida Supreme Court disclose that as of March 1, 1980 there were approximately 110 death penalty cases pending review in the Florida Supreme Court and that the Court has received an average of 30 to 35 additional death cases per year since the present statute was enacted. England, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. of Fla.L.R. 147, 162 (1980). Consequently, accepting petitioner's statement that the Court has presently pending before it 28 cases in which the death penalty was imposed over the recommendation of the jury, it is clear that in the far greater number of cases, the jury

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[3] See Gregg v. Georgia, 428 U.S. 153 (1976), (jury or judge, in cases tried without a jury, must find at least one aggravating factor and decide to impose the death penalty); Jurek v. Texas, 428 U.S. 262 (1976)(if sentencing jury answers a series of three questions in the affirmative, sentence of death must be imposed); Proffitt, supra, (jury weighs aggravating and mitigating circumstances and renders advisory sentence to sentencing judge who makes independent assessment of such circumstances prior to imposing sentence).

recommended death. (See petitioner's Appendix D, pp. 3d-4d). Furthermore, petitioner, by his own data, has shown that of 61 instances in which the sentencing judge has ever overridden the jury's recommendation of life, the Florida Supreme Court has to date upheld the sentence of death only 9 times.[4] The fact remains that a sentence of death imposed over the recommendation of the jury rarely survives Florida's tripartite procedure. Indeed, a sentence of death so imposed has never been executed in Florida. Petitioner's second indicator thus indicates nothing.

Petitioner then turns our attention to legal commentary. However, respondent wishes to emphasize that every text or article relied upon by petitioner was available to this Court prior to its decision in Proffitt and thus affords the Court no new guidance upon which to reverse Proffitt. Certainly this Court was aware of legal commentary on both sides of the issue as to whether a judge or jury should sentence a person to death when it reviewed the Georgia and Florida schemes which differed in this regard. Gregg v. Georgia, 428 U.S. 153, 189, 190(1976), and Proffitt, 428 U.S., at 252, n. 10. Thus, petitioner's "indexes of unconstitutionality" prove nothing.

B. Florida's Practice, as Interpreted by The Supreme Court of Florida, Does not Violate the Federal Constitution.

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[4] Gardner v. State, 313 So.2d 675 (Fla. 1975); Sawyer v. State, 313 So.2d 680 (Fla. 1975); Douglas v. State, 328 So.2d 18 (Fla. 1976); Dobbert v. State, 328 So.2d 433 (Fla. 1976); Barclay v. State, 343 So.2d 1266 (Fla. 1977); Hoy v. State, 353 So.2d 826 (Fla. 1977); Johnson v. State, 393 So. 2d 1069 (Fla. 1980); McCrae v. State, 395 So.2d 115 (Fla. 1980); and White v. State, ___ So.2d ___, Case No. 54, 292, March 20, 1980, rehearing pending. As petitioner shows in his appendices, the sentence of three of these were subsequently reduced to life imprisonment and of the remaining six, this Court has upheld the sentence of one, Dobbert v. Florida, 432 U.S. 282 (1977), and refused to review two others. Douglas, supra, cert.den., 429 U.S. 871 (1976), reh.den. 429 U.S. 1055 (1977), and Barclay, supra, cert.den., 439 U.S. 392 (1978).

In truth, what petitioner seeks under his second sub-point is an advisory opinion of this Court directed to the Florida Supreme Court and the Florida Legislature on the meaning of Furman. Of course, this Court has always steadfastly refused to exercise its extraordinary certiorari jurisdiction for such purpose. Muskrat v. United States, 219 U.S. 346 (1911).

Accordingly, even if the Florida Supreme Court was being overly cautious in its reading of Furman with respect to allowing the judge to override a jury recommendation of life imprisonment, that would not necessitate review by this court unless such action is repugnant to the United States Constitution. This, petitioner has utterly failed to demonstrate. Of course, respondent does not concede a misinterpretation by the Florida Supreme Court. This Court in Furman declared unconstitutional a death penalty scheme which afforded the sentencing authority too much unguided discretion, resulting in the imposition of the death penalty in a freakish and capricious manner. 408 U.S., at 390 (Stevens, J., concurring). It is the considered view of the Florida Supreme Court that if the sentencing court were bound by the recommendation of the jury, the death sentence in Florida might be freakishly imposed. Douglas v. State, 373 So.2d 895, 897 (Fla. 1979, and Johnson v. State, 393 So.2d 1069, 1074 (Fla. 1980).[5] This Court specifically recognized the wisdom of this determination by the Florida Legislature in Proffitt wherein this Court stated:

> And it would appear that judicial sentencing should lead, if anything, to even

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[5] The Florida Supreme Court gave early approval to the determination of the Florida Legislature that judges rather than juries should determine the sentence in capital cases by stating that "a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

> greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

428 U.S., at 252.

Consequently, while it may be true that Furman does not mandate that a capital-sentencing scheme provide for judicial rather than jury sentencing, it is clear that Furman does not prohibit it. Certainly this Court made it clear in Proffitt that this aspect of the Florida statute does not run afoul of the Constitution as explicated in Furman as did the death penalty schemes struck in Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Coker v. Georgia, 433 U.S. 584 (1977); and Beck v. Alabama, 447 U.S. 625 (1980).[6] Respondent believes that it would have been difficult for the Court to have put a more positive stamp of approval on Florida's death penalty statute than the remarks quoted above from the Proffitt opinion.

C. Florida's Practice Authorized by its Death Penalty Statute, of Permitting a Trial Judge to Override a Jury Advisory Recommendation of Life Imprisonment Does not Violate the Federal Constitution.

Petitioner's third sub-point is based upon the flawed premise which underlies many of his contentions; that an advisory recommendation of life imprisonment by a

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[6] Woodson and Roberts involved mandatory impositions of the death penalty; Lockett involved an impermissible restriction upon the consideration of mitigating circumstances by the sentencing authority; Coker involved the impermissible application of the death penalty to the rape of an adult; Beck involved an impermissible prohibition of instructions of lesser included offenses in capital cases.

jury is equivalent to a verdict of not guilty.[7] Consequently, virtually all of the authority relied upon by petitioner is totally irrelevant to the issue raised. Were we here involved with a situation in which the trial judge had convicted petitioner over the jury's verdict of not guilty, we could see the relevancy of cases relating to the function of juries in rendering verdicts free from government oppression. But this isn't the case. Consequently, petitioner's arguments go wide of the mark.

Turning to petitioner's main contention under this sub-point, respondent answers that this Court has already considered the implications of Witherspoon v. Illinois, 391 U.S. 510 (1968), upon the Florida capital sentencing scheme. In Proffitt, the Court remarked: "This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 US 510, 519 n 15, 20 L Ed 2d 776, 88 S Ct 1770, 46 Ohio Ops 2d 368 (1968), but it has never suggested that jury sentencing is constitutionally required." 428 U.S., at 252. Unlike those states which do not provide for any participation by a jury in capital sentencing,[8] Florida does permit the sentencing judge to be guided by the opinion of the jury, thus furthering the important societal function to which this Court referred in Witherspoon. However, the fact that Florida has chosen to assure greater reliability in capital sentencing by intrusting that awesome task to trial judges

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[7] A more thorough refutation of this premise is contained under part D. of this Response.

[8] Of the five states which exclude jury participation in capital sentencing (see petitioner's Appendix E), the highest court in three have upheld their capital punishment statutes against the contention that the exclusion of juries from the sentencing determination was unconstitutional. State v. Simants, 250 N.W.2d 881, 887 (Neb. 1977), citing Proffitt in upholding the Nebraska statute; State v. Coleman, 605 P.2d 1000, 1017 (Mont. 1979), upholding the Montana statute; and State v. Richmond, 560 P.2d 41, 51 (Ariz. 1976), and State v. Watson, 586 P.2d 1253, 1259 (Ariz. 1978), upholding the Arizona statute.

does not in any way constitute a violation of the United States Constitution as applied in Witherspoon. Simply put, Witherspoon requires that if a State chooses to involve a jury in its capital sentencing procedures, it may not constitutionally exclude jurors opposed to capital punishment and thereby produce "a jury uncommonly willing to condemn a man to die." 391 U.S. 521.

Petitioner's attack upon the standard by which the Florida Supreme Court reviews death sentences imposed over the recommendation of the jury as announced in Tedder v. State, 322 So.2d 908 (Fla. 1975), is a misstatement of the court's rationale. The court in Tedder was not concerned that the jury's recommendation might be based upon scruples against the death penalty; rather, the court was concerned that the recommendation may have been based upon caprice or emotion instead of reason. But because of the importance of the jury as the conscience of the community, the court imposed a very exacting standard of review:

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

322 So.2d, at 910.

As earlier stated, a sentence of death has rarely survived Florida's tripartite capital-sentencing scheme and it is evident that the Tedder standard approvingly referred to in Proffitt, 428 U.S., at 249, has significantly contributed to that fact. The Florida Supreme Court applies that standard in its careful review of the written findings of the sentencing judge in support of the sentence imposed and petitioner has not suggested that the Florida Supreme Court has failed to properly exercise this important function under the statute.

Witherspoon simply has no relevancy to the issue of whether a judge can override an advisory recommendation of sentence by a jury. The statement of this Court in the footnote to which petitioner alludes merely demonstrates the concern that a jury used in a capital-sentencing scheme must be representative, regardless of whether the judge is bound by the jury's recommendation. Since the new Illinois statute allowed the judge to override a recommendation of death, it was not necessary for the court to broaden its statement beyond the facts of the case.

D. Florida's Practice of Permitting a Trial Judge to Override a Jury Advisory Recommendation Does not Present any Double Jeopardy Problem Under the Fifth and Fourteenth Amendments.

This Court's reasoning and holdings in United States v. DiFrancesco, ___ U.S., ____,66 L.Ed.2d 328 (1980), and Swisher v. Brady, 438 U.S. 204 (1978), are dispositive of this issue as best respondent can comprehend the multifarious contentions made by petitioner. Even though his contentions are less clearly made here than below, they should similarly be rejected. Johnson, 393 So.2d, at 1074.[9] Perhaps before turning individually to

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[9] The court in Johnson relied upon its holding in Douglas, 373 So.2d at 897, wherein it stated:

> Although the precise foundation of a "double jeopardy" argument was not presented to the high court in Proffitt, that court not only understood the jury's role in Florida's scheme for imposing the death sentence but expressly approved its validity against a backdrop of Florida caselaw which established the framework for trial judges to override a jury's recommendation of a life sentence. See 428 U.S. at 249-53, 96 S.Ct. 2960. Plainly, the supreme court did not consider a jury recommendation of life imprisonment to be an acquittal of a death-appropriate crime, so as to bar imposition of a death sentence by the trial judge.

the seemingly unrelated factors which together are alleged to make petitioner's case a unique test of double jeopardy, it would be useful for respondent to broadly respond to petitioner's principal contention.

In DiFrancesco, this Court extensively reviewed the Double Jeopardy Clause of the Fifth Amendment and applied its analysis to a federal statute which authorized the government to appeal a sentence imposed upon a dangerous special offender and which authorized the imposition of a more severe sentence as a result of that appeal. While not factually analogous, many conclusions of the Court in DeFrancesco are particularly pertinent and instructive to the resolution of petitioner's contention.

Essentially petitioner would have this Court find that the Double Jeopardy Clause applies to his sentence insofar as the jury's recommendation constituted initial jeopardy which prohibited the sentencing judge from making his subsequent and independent determination with respect to imposition of the sentence of death. We begin our analysis with the application of double jeopardy to sentencing in general. In DeFrancesco, this Court set forth three separate constitutional protections under the guarantee against double jeopardy as follows:

> "That guarantee [against double jeopardy] has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (Footnotes omitted.) North Carolina v. Pearce, 395 US, at 717, 23 L Ed 2d 656, 89 S Ct 2072.

66 L.Ed.2d, at 340.

As we understand it, petitioner would have us address the first and third of these protections since

the second can have no application sub judice. Presumably then, petitioner would first have this Court rule that the jury's recommendation constituted an acquittal of a capital offense. Such a contention is without merit. As discussed in DiFrancesco, the Double Jeopardy Clause unequivocally prohibits a second trial following an acquittal. See Fong Loo v. United States, 369 U.S. 141 (1962), and Burks v. United States, 437 U.S. 1 (1978). Petitioner argues that the jury's advisory recommendation of life at his trial constituted an acquittal since an acquittal prevents retrial even if "the acquittal was based upon an egregiously erroneous foundation." Fong Loo, 369 U.S., at 143. See also United States v. Ball, 163 U.S. 662 (1896). This Court rejected a similar contention in DiFrancesco and there are even more compelling reasons why it should do so here. 66 L.Ed.2d, at 343.

The majority in DiFrancesco set forth a reasoned and correct analysis of why the imposition of one sentence is not an implied acquittal of any greater sentence for purposes of double jeopardy. Even so, this Court was at least faced with a double jeopardy argument arising from two distinct impositions of sentence. Put another way, the initial sentence from which the appeal was taken in DiFrancesco was at least arguably final. The same can hardly be said of a jury advisory recommendation which a Florida trial judge is by statute empowered to override.

The recommendation of the jury in a capital sentencing proceeding in Florida is more analogous to the circumstances in Swisher, supra. In Swisher, this Court rejected a double jeopardy attack upon a state

procedure whereby a juvenile court judge could accept, modify or reject the recommendations of a master and even take additional evidence under certain circumstances. While this Court did not address the issue of whether jeopardy attached to a juvenile at the proceeding before the master, the court did find that the juvenile procedure under review subjected the juvenile "to a single proceeding which begins with a master's hearing and culminates with an adjudication by the judge." 438 U.S., at 215. Swisher was thus said to differ from the circumstances in Breed v. Jones, 421 U.S. 519 (1975), wherein an adult trial of a juvenile following a juvenile proceeding involving the same conduct was found to constitute double jeopardy. Swisher, 438 U.S., at 217-218. So, too, does the Florida capital sentencing procedure differ from two distinct verdicts at two distinct proceedings. In short, Florida subjects a capital defendant to a single proceeding which begins with a trial on the merits, and if the verdict be guilty as charged, culminates with an adjudication by the judge who may accept or reject the recommendation of the jury.

The third protection recognized by this Court, one against multiple punishments, is likewise not involved in this case. Again, in DiFrancesco, this Court ruled that this protection did not prohibit an increase in punishment, especially where under the statutory scheme the defendant had "no expectation of finality in the original sentence." 66 L.Ed.2d, at 347. So long as the punishment imposed did not exceed that authorized by Congress, such an increase did not violate the guarantee against multiple punishment.

66 L.Ed.2d 347. The dissent took issue with this conclusion,[10] but respondent submits that a stronger case is made in favor of the majority's position where, as here, the capital defendant knows that the jury's recommendation is advisory only and, more importantly, that recommendation does not constitute an imposition of sentence which is "increased" by the judge's decision to override it. Accordingly, the single imposition of sentence by the trial judge cannot conceivably constitute multiple punishment.[11]

It may be true that a capital defendant places as much importance upon his sentence as the determination of his guilt, but the period of anxiety to which this petition must be limited is that period between the recommendation of the jury and the subsequent determination of the judge. In petitioner's case, the judge took over a month to carefully weigh the evidence and recommendation of the jury before deciding to override that recommendation.[12] Moreover, as this Court also stated in DiFrancesco, "[t]he Double Jeopardy Clause does not provide

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[10] The dissent was concerned with the implications of the suggestion that double jeopardy protections could be legislatively circumvented so long as the defendant was aware that his sentence could be increased on appeal. DiFrancesco, 66 L.Ed.2d, at 354. This concern is not attendant to a sentencing scheme however which provides for only one imposition of sentence (by the sentencing judge) which can only be affirmed or reduced on appeal.

[11] Of course, Florida law neither permits nor contemplates the imposition of the sentence of death for the first time on appeal.

[12] The jury rendered its advisory recommendation on December 9, 1978 and the sentence of death was imposed on January 12, 1979.

the defendant with the right to know at any specific time what the exact limit of his punishment will turn out to be." 66 L.Ed.2d, at 346. While this Court was thus stating that a penalty could be increased on appeal, in Florida the capital defendant knows that the Florida Supreme Court can only affirm or reduce his death sentence.

When viewed in the light of DiFrancesco, we find nothing in Mr. Justice Story's hypothetical relevant to this issue since it so obviously involved the double jeopardy considerations attendant to a retrial for a more severe offense following an acquittal for what is essentially a lesser included offense. United States v. Gilbert, Case No. 15,204, 25 Fed.Cas. 1287, 1301 (C.C.D. Mass. 1834). The jury in making its recommendation, and the judge in determining sentence, must find beyond a reasonable doubt the existence of at least one aggravating circumstance which outweighs any mitigating circumstance. This requirement does no more than guide the jury and judge in their separate determinations as required by Furman. Those circumstances, aggravating or mitigating, help define the capital offense for the purpose of aiding the judge in determining the sentence to be imposed but in no way raise the jury's recommendation to the level of a verdict of acquittal. Finally, the sentencing judge makes an independent determination as to the existence of aggravating and mitigating circumstances and whether the sentence of death is appropriate because the statute requires that he do so.[13]

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[13] The statute provides in pertinent part:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances,

Accordingly, this is not a situation in which "prolonged jeopardy," if any, results from an appeal by the state.

E. Florida's Practice of Permitting a Trial Judge to Override a Jury Advisory Recommendation is Constitutional and Fair to all Parties Concerned.

Petitioner continues to base his constitutional arguments on the faulty premise that an advisory recommendation of life is the equivalent of a verdict of acquittal. DiFrancesco teaches that it is not. Petitioner's reliance on a footnote in Gregg, 428 U.S., at 199 n. 50, is misplaced. A reading of the footnote leads to the inescapable conclusion that this Court, in rejecting the appellant's arguments that the Georgia statute allowed for too much discretion, was not prepared to require a capital punishment scheme so rigid that it would not allow the jury to afford mercy if empowered so to do, nor otherwise require a scheme so rigid as to be "totally alien to our notions of criminal justice." Id. This is hardly the same thing, however, as stating that the jury must be allowed to bind the judge in affording mercy where the statutory scheme makes the jury's determination advisory only. Proffitt alone teaches us that.

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shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

Petitioner's attack upon the Florida Supreme Court's standard of review of death sentences imposed over the recommendation of the jury has already been addressed in this response. By permitting the sentencing judge to override an unreasonable recommendation of life, Florida is merely adhering to the reasoning expressed by this Court in Beck, supra, that "to insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that have tended to diminish the reliability of the sentencing determination.[14] 447 U.S., at 638. Rather than diminish the reliability of the sentencing determination, Florida has, by allowing the trial judge to determine the sentence to be imposed, sought to "assure that the death penalty will not be imposed in an arbitrary and capricious manner." Proffitt, 428 U.S., at 253.

Turning finally to petitioner's four factor due process analysis, we prefer to respond to the three factor analysis used by this Court and by the author of the article upon which petitioner relies. Note, Gardner v. Florida: The Application of Due Process to Sentencing Procedures, 63 Virg.L.Rev. 1281, 1284 n. 28. Therein the author quotes this Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), as follows:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation

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[14] The procedural rules to which this Court referred were those stricken in Gardner, Lockett, and Woodson, supra.

> of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Under this analysis, clearly the capital defendant has an interest in the sentencing scheme, including the authority of the judge to override the recommendation of the jury. But it must be remembered that such interest includes the knowledge that the judge may impose a sentence of life imprisonment over a jury recommendation of death. In short, it is in the defendant's interest that the sentence be determined on the basis of "reason rather than caprice or emotion." Gardner, 430 U.S., at 358. For this very reason the second factor is satisfied, for the Florida tripartite sentencing scheme minimizes the risk that a capital defendant will be erroneously deprived of his interest in the sentence. Similarly, the state's interest that the death penalty be fairly imposed is likewise assured. The fiscal and administrative factors involved are not so significant when the state is exercising this legitimate state action which "differs dramatically from any other" such action. Gardner, 430 U.S., at 358. Petitioner's concern for the impact of these relatively few cases upon judicial economy is likewise unpersuasive in light of recent changes in the jurisdiction of the Florida Supreme Court which greatly lessened its caseload.[15]

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[15] England, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, supra.

F. The Imposition of the Death Penalty by a Trial Judge by Overriding the Advisory Recommendation of the Jury Neither Conflicts With any Plan of Limited and Representative Government nor Violates the Principle of Judicial Restraint.

Basically, petitioner has in his final argument launched an attack upon the determination by the Florida Legislature that judges rather than juries should render the sentencing decision in capital cases. Of course, it is the prerogative of the states to make that determination. Chaffin v. Stynchcombe, supra. But beyond that, this Court in Gregg, 428 U.S., at 175-176, specifically recognized the importance to be attached to the decisions of the various state legislatures with respect to punishments for crimes under our system of government. "Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state, the moral consensus concerning the death penalty" should compel this Court to defer to the wisdom of the Florida Legislature its decision to provide for advisory recommendations of sentence by juries in capital cases. 428 U.S., at 186, 187.

Certainly respondent agrees with petitioner that the death penalty differs markedly from other legitimate state action. But this does not affect the fact that the manner in which Florida has chosen to carry out that action is constitutional.

Petitioner's authority in his final argument is again irrelevant. It is obvious from his article that Justice Powell was concerned with the double jeopardy implications of state appeals from jury verdicts of acquittal. Powell, Jury Trial of Crimes, 23 Washington and Lee L. Rev. 1 (1966). It is clear from his position in DiFrancesco

that Justice Powell does not agree with petitioner that the imposition of a sentence is an implied acquittal of any greater offense so as to equate sentencing determinations with verdicts of guilt or acquittal.

Similarly, the quoted comments of Justice Rhenquist in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 348 (1979), have no bearing on the issues raised in the petition because petitioner was not deprived of his right to a jury, a right the denial of which, as seen by Justice Rhenquist, served as the impetus for his remarks. Nor does respondent find the quoted comments of the United States Solicitor General in his amicus brief in Gregg of any import. Clearly those comments, made in favor of the Georgia sentencing scheme which allows for jury sentencing, must be limited to the facts of the case to which they referred.

Finally we find it interesting that petitioner does not find it to be an abuse of judical restraint for this Court to find that the Florida courts abuse their judicial restraint when they follow the capital sentencing procedures enacted by the elected representatives of the citizens of Florida. If applicable to this petition at all, the doctrine of judicial restraint would require this Court to find an absence of any issue warranting review by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

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